In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-384

ATLANTIC MARINE, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In the underlying unfair labor practice case the Board found that Atlantic Marine, Inc. and Atlantic Drydock Corp. (the Company) had discriminatorily discharged three employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3) and (1). 193 NLRB 1003. Following a backpay hearing the Board determined the exact amounts of backpay owed the three employees and ordered the Company to pay them those amounts (211 NLRB No. 42; Pet. App. D, 5a-10a). The court of appeals enforced the order in a *per curiam* decision (512 F.2d 1404; Pet. App. A, 1a). The sole basis for the petition is the Company's contention that it was unable effectively to cross-examine Board compliance officer Morley at the backpay hearing because the Board refused to produce his notes, which are contained in its investigative files, for the purpose of

refreshing Morley's recollection as to the exact date when he entered the case (Pet. 3).[1] This contention was properly rejected by the Board and the court of appeals and does not warrant further review.

While the Fifth Circuit in *J.H. Rutter Rex Mfg. Co., Inc.* v. *National Labor Relations Board,* 473 F.2d 223, certiorari denied, 414 U.S. 822, held that production of Board investigatory files may be compelled to refresh a witness's recollection, that decision, principally relied upon by the Company, carefully circumscribes this limited exception to the recognized confidentiality of such files. The court emphasized in *Rutter Rex* that the company had there made a "clear showing * * * that production of the * * * file * * * might very well resolve a disputed material factual issue." 473 F.2d at 240.

Here, by contrast, the Company made no showing that Morley's testimony as to the exact date he began his investigation would have cast any light upon the validity of the reinstatement offers or the method for computing the backpay awards. To the contrary, the Company already knew that Morley had entered the case around November 1972 since Morley had testified that he began his investigation about "four or five months" before the April 1973 backpay specification was issued (A. 80).[2] Furthermore, Morley testified that, while he had discussed the

---

[1]The Company contended that Morley, who had replaced another compliance officer and had recomputed backpay at a higher amount, had conducted an incomplete investigation and had come into the case after the claimants had voluntarily refused reinstatement and settlement of their backpay claims (Pet. 6).

[2]"A." references are to the appendix in the court of appeals. A copy has been lodged with the Clerk.

reinstatement offers with the discriminatees, his knowledge of the offers came primarily from file reports of other Board agents who had investigated the offers before he was assigned to the case (A. 110-112). Thus, the exact date of his coming on the case was immaterial.

Moreover, although Company counsel cross-examined Morley regarding his computations, at no time did Morley indicate that reference to his investigative notes was necessary to refresh his recollection regarding his method for computing the backpay awards (A. 89-117). In these circumstances, the Company was not denied a fair hearing or due process by the Board's refusal to produce Morley's notes contained in its investigative files. Indeed, no useful purpose would have been served by their production (see Pet. App. E, 14a-15a).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,
National Labor Relations Board.

NOVEMBER 1975.

DOJ-1975-11